IN THE HIGH COURT OF JUDICATURE AT BOMBAY

O.O.C.J.

NOTICE OF MOTION NO.576 OF 2005

IN

SUIT NO.258 OF 1996

...

Mrs.Jean Nusly Duggan ...Plaintiff

v/s.

Feroze Homi Duggan & Ors. ...Defendants

And

Court Receiver ...Respondent

...

Mr.Snehal Shah i/b L.C. Tolat & Co. for the Plaintiff.

Mr.H.G.Thakkar with Mr.Manish Vora i/b Soloman & Co.

for Defendant No.1.

Mr.V.A.Thorat with Mr.P.K. Dhakephalkar and Mr.Pankaj Kawli & Ms.Deepa Mani i/b S.K.Srivastava & co. for Defendant No.3 in support of Notice of Motion.

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CORAM: D.K.DESHMUKH, J.

DATED: 31ST MARCH,2005

P.C.:

1. This Notice of Motion is taken out by the Defendant No.3. The Defendant No.3 by this Notice of Motion seeks an interim order from the Court directing the Receiver appointed by this Court of the suit premises to hand over possession of the suit premises to the third Defendant as his agent on the terms and conditions of agency agreement as per the order dated 17-3-1998 and 2-4-1997 passed by this Court.

2. The facts that are material and relevant for

deciding this petition are that the suit property is a Bungalow, namely "Lawn Side", 6, Jamnadas Mehta Marg, Malbar Hill, Mumbai-400 006. The Plaintiff claims to be heir of the deceased, who was admittedly the owner of the Bungalow. The Defendant No.1, apart from being the heir claims that there is a will in his favour executed by the deceased bequeathing the bungalow to him. The Defendant No.3 claims to be the tenant of the Bungalow. Admittedly, this Court appointed a Receiver on the Bungalow. In the Appeal (Lodging) No. 270 of 1997, an order was passed dated 2nd April, 1997 and the Defendant No.3 was directed to be appointed as agent of the Receiver to be in possession of the suit premises on payment of royalty at the rate of Rs.3 lakh per month. He was to pay the amount of royalty regularly on or before 10th of each calender month and agency agreement was to be executed. An undertaking was also to be filed for payment of arrears of royalty on or before 20th May, 1997. Clause (vii) of this order is relevant, which reads as under:-

> (vii) If there is any default in payment of the royalty amount for a period of two

months then it would be open to the Receiver to take possession of the property in question.

3. It appears that, thereafter, the Defendant No.3 committed default in depositing the amount of royalty to the tune of Rs.13,50,000/- for the period ending with 31st March, 1997 and therefore in terms of the order passed by the Division Bench in Appeal referred to above, the Defendant No.3 became liable to hand over possession back to the Court Receiver. The Court Receiver called upon the Defendant No.3 to hand over possession, but the Defendant No.3 did not hand over possession. It appears that, thereafter, at the instance of the Plaintiff the Court has passed the order dated 16th April, 1999 ordering the Receiver to take forcible possession of the property. Against that order the Defendant No.3 filed an Appeal, which was dismissed. Special Leave Petition to the Supreme Court was also filed. It appears that, thereafter, the Defendant No.3 took out proceeding for condonation of delay in payment of royalty and also for extension of time. It appears that the Defendant No.3 on 30-6-1999 deposited the amount of arrears of royalty. An

undertaking was also given to the Court whereby the Defendant No.3 undertook to pay the amount of royalty regularly and also to pay outgoings. Thus, the position of the Defendant No.3 as the agent of the Receiver continued. But in spite of undertaking given to the Court the Defendant No.3 again stopped paying the amount of royalty. Therefore, the Court Receiver addressed a letter dated 18-1-2001 for taking possession of the property from the third defendant. The Defendant No.3, however, refused to hand over possession. Thereafter, proceedings were required to be taken by the Plaintiff for taking possession of the property from the Defendant No.3. It appears that, ultimately, the third Defendant handed over possession of the property to the Receiver in October, 2002. It appears that the last payment of royalty was made by the third Defendant before possession of the premises was handed over by the third Defendant to the Receiver on 30-6-1999. It appears, thereafter, in 2004 the third Defendant paid the arrears of the amount of royalty for the period during which he continued to be in possession, though he was not entitled to it and it may be further noted that it is an admitted position that in the meantime the property has suffered heavy

damage and requires extensive repairs, but the repairs have not yet been carried out by the Receiver. In this back ground, the third Defendant has taken out this Notice of Motion for being reinducted as agent of the court receiver.

4. This Notice of Motion is opposed both by the first Defendant as well as by the Plaintiff. According to them, the conduct of the third Defendant disentitles him for being appointed as agent of the Receiver. It is pointed out that the third Defendant has repeatedly committed breach of the solemn undertaking given to this Court as also the orders passed by this Court. The third Defendant, after committing default and acting contrary to the undertaking, continued to hold the property to which he was not entitled and proceedings were required to be taken for getting possession of the property. The learned Counsel appearing for the third Defendant submits that though it is true that the third Defendant has committed default and therefore he lost possession of the property and his appointment a agent of the Receiver also was terminated, considering that there is agreement of tenancy executed by Defendant No.1

in his favour and as his appointment as agent of the Receiver was without prejudice to his contention that he is tenant of the property, the third Defendant should be appointed as agent of the Receiver.

5. After having heard the learned Counsel for both sides and after having perused the record, I find that the Defendant No.3 does not deserve to be appointed as agent of the Receiver. The property in dispute is taken in possession of the Court and the property is made custodilogis by the Court so that the property can be protected. The property is given in possession of somebody by court as agent of the receiver, so that the property can be preserved and protected, which is the obligation of the court itself. Therefore, the person who is to be appointed as agent of the Receiver must be a trustworthy person. A person who does not abide by the orders passed by the court as also undertaking given to the Court as also undertaking given to the court and has tendency to defy the orders of the court, in my opinion, cannot be said to be trustworthy person and therefore would be unfit to be appointed as agent of the Receiver. The third

Defendant was appointed as agent on a clear understanding that he will have to be pay the amount of royalty regularly and any two defaults committed by him will result in termination of the agency and the Receiver will be entitled to take possession. Despite, this clear understanding, the third Defendant committed defaults and still did not hand over voluntarily the possession to the Receiver. The Plaintiff was required to take up proceedings for taking forcible possession. Those orders were challenged till the Supreme Court and it is thereafter that proceedings were taken up for condoning the delay in payment of royalty. The Court, it appears taking lenient view permitted the third Defendant to deposit the amount of arrears and continued him in possession as agent. Following averments found in paragraph 6(ix), about the conduct of the Defendant No.3, of the affidavit of Shri Ravi Narayan Amin, Constituted Attorney of Defendant No.1 are relevant. They read as under:

> "Benzer committed defaults in depositing with the Court Receiver Rs.13,50,000/- on account of arrears of royalty for the

period upto 31st March, 1997 and royalty at the rate of Rs.3 lakhs per month for the months of August, 1998 onwards, whereupon the Court Receiver called upon benzer to hand over possession. However, Benzer resisted delivery of possession to the representative of the Court Receiver, with the result on the application of Mrs.Jean Duggan, this Hon'ble Court had to pass order dated 16th April, 1999 ordering the Court Receiver to take forcible possession of the suit property. Benzer filed Appeal No.474 of 1999 in respect of the said Judge's Order dated 16th April, 1999, which was dismissed by Division Bench of this Hon'ble Court by Order dated 3rd May, 1999. Special Leave Petition (Civil) No.7075 of 1999 filed by Benzer in respect of the said Judgment and order dated 3rd May, 1999 of the Division Bench of the Bombay High Court was dismissed as withdrawn by the Hon'ble Supreme Court on India by order dated 13th May, 1999. Thereafter Benzer took out Notice of Motion No.2334 of 1999 in Suit No.258 of 1996 and Notice of Motion No.2335

of 1999 in Suit No.4847 of 1995 praying for condonation of delay and extension of time for depositing royalty for the months of August, 1998 to June, 1999 and on 30th June, 1999, Benzer deposited with the Court Receiver Rs.33 lakhs on account of royalty at the rate of Rs.3 lakhs per month from August, 1998 to June, 1999. The said Notices of Motion Nos. 2334 of 1999 and 2335 of 1999 were disposed of by orders dated 5th July, 1999 passed by this Hon'ble Court, in which it is noted that Benzer undertook to pay royalty on time and pay Municipal taxes and outgoings and not to use the premises for any purpose other than residence by Director of Benzer and the Court Receiver was directed to hand back possession to Benzer."

6. To this affidavit of Shri Ravi Amin, a chart is annexed at Exh."F", which shows that after making payment of the arrears of royalty on 30-6-1999 for restoration of possession to it, the third Defendant stopped making any further payment of royalty. It is pertinent to note that at the time of restoration

of possession an undertaking was given on behalf of the third Defendant to pay the amount of royalty regularly every month. That undertaking was breached immediately after it was given. Despite, there being an order of the Court that any two defaults in payment of royalty will result in termination of the agreement of agency, possession of the premises was not voluntarily handed over to the Receiver. Again proceedings were taken in Court for taking the possession. Following averments in paragraph 6(x) from the affidavit of Mr.Ravi Amin are relevant. They read as under:-

> "After obtaining from this Hon'ble Court orders dated 5th July, 1999 by undertaking to continue to pay the royalty on time and to pay the Municipal taxes and outgoing as and when required by the Court Receiver, Benzer did not deposit any further amounts with the Court Receiver. The Court Receiver by letter dated 18th January, 2001 fixed an appointment on 5th February 2001 for taking physical possession from Benzer. On 5th February, 2001 employees of Benzer

refused to hand over physical possession of the premises to the representatives of the Court Receiver. Thereupon on the application on behalf of Dr.Feroze Duggan, Judge's order dated 7th March, 2001 were passed in Suit No.4847 of 1994 and Suit No.258 of 1996 directing the Court Receiver to take forcible possession of the suit premises. Even thereafter, Benzer continued to avoid handing over possession to the Court Receiver by taking out Chamber Summons No.457 of 2001 in Suit No.258 of 1996 and Notice of Motion No.2239 of 2000 in appeal No.324 of 1997. Dr.Feroze Duggan had to file Appeal No.753 of 2001 in respect of ad-interim Order passed on Chamber Summons No.456 of 2001 in Suit No.4847 of 1995 and Appeal No.895 of 2001 in respect of ad-interim order passed on Chamber summons No.457 of 2001 in Suit No.258 of 1996 and the said Appeals were disposed of by Orders dated 10th October, 2001 of the Division Bench of this Hon'ble Court, under which ad-interim orders were set aside and Benzer were directed to hand

over possession of the suit property to the Court Receiver within 3 days. Only thereafter, Benzer handed over to the Court Receiver possession of the suit property on 22nd/24th October 2001. Chamber Summons No.456 of 2001 and Chamber Summons No.457 of 2001 taken out by Benzer were dismissed by Orders dated 30th October, 2001. Application on behalf of Benzer Interiors Pvt.Ltd. for being relieved of their Undertaking with the Court Receiver for Rs.3,00,000/- per month has been rejected by Order dated 29th October, 2001 passed by the Division Bench of this Hon'ble Court.

7. It appears from the order dated 29th October, 2001 passed by the Appeal Court that the third Defendant handed over possession on 24th October, 2001. It is obvious from the above narration that the third Defendant handed over the possession when it became impossible for him to continue to be in forcible possession. In my opinion, the conduct of the Defendant No.3 of continuing to be in possession, despite committing default and resisting attempts made on behalf of the Receiver for handing

over possession disentitles the third Defendant for again being appointed as agent of the Receiver. In my opinion, a litigant who has been appointed as agent of the Receiver by the Court in exercise of its discretionary power owes a duty to the court to voluntarily hand over possession of the premises to the Receiver immediately after he finds that he is not in a position to pay royalty as per his undertaking and the order of the Court. If conduct like that of the third Defendant of defying the Court's order is tolerated by the Court, it will encourage the litigants to disobey and disregard the orders made by the Court. The effectiveness of the system of administration of justice depends on the litigants voluntarily obeying the orders passed by the Court. The present system has been able to survive because a large number of orders made by the court are voluntarily obeyed and carried out by the litigants. If each and every order passed by the court is required to be enforced forcibly, considering the number of matters that come to court, it will be impossible for the Court to enforce all its order. This will take away the effectiveness of the system itself. Therefore, in my opinion, every court should insists that an order

made by it shall be obeyed by a litigant unless the order is either set aside or stayed by a higher court and anybody who does not do so disentitles himself for getting any order in his favour which is in the discretion of the Court. Merely by making applications to the court for extension of time to pay royalty without obtaining appropriate interim orders from the court, the third Defendant was not entitled to continue in possession of the premises. In my opinion, it becomes the duty of the Court to come down heavily whenever the Court sees such a conduct of a litigant. Tolerating such a conduct, in my opinion, will erode the very system of administration of justice. There are also allegations made against the third Defendant that there are company petitions pending against it, because it is not in a position to pay its debts. I do not intend to go into that aspect of the matter. In my opinion, the conduct of the third Defendant of committing the breach of the undertakings and continuing in possession in defiance of the orders of the Court is enough to disentitle the third Defendant to be appointed as agent of the court receiver.

8. So far as the aspect of claim of tenancy of the third Defendant is concerned, in my opinion, that claim will not be relevant. The claim of the third Defendant to be tenant of the premises would be relevant when the court is deciding the question whether Receiver is to be appointed on the property. Because the order appointing the Receiver may adversely affect the interest of a person who is claiming to be the tenant, but once the Receiver is appointed and the property becomes custodilogis, the consideration that weighs with the court in appointing the agent of the Receiver is, apart from the other aspects, the trustworthiness of the person who can protect the property while it is custodilogis.

9. Taking overall view of the matter, therefore, in my opinion, the third Defendant is not entitled to be appointed as agent of the Receiver. Notice of Motion disposed of.

10. While considering this Notice of Motion I fond that it is common ground that the suit property is in a dilapidated condition and extensive repairs are required. The Plaintiff and the Defendant No.1 are

willing that the repairs to the property should be carried out immediately. I have been informed that considerable amounts are lying in deposit with the Receiver, which can be utilised for the purpose of carrying out the repairs. In my opinion, it will not be appropriate to take steps to appoint agent of the Receiver to be in possession of the property while the property is in dilapidated condition. In my opinion, therefore, following directions would be in the interest of justice to be issued to the Receiver. The Receiver to take immediate steps to carry out necessary repairs to the suit property. The Receiver shall be at liberty to utilise the funds that are lying in deposit with the Receiver for the aforesaid purpose. After carrying out necessary repairs, the Receiver shall put in a report to the Court seeking orders of the court for appointment of the agent of the Receiver to be in possession of the property. While taking steps for carrying out the repairs, the Receiver shall consult the Plaintiff and the Defendant No.1.

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